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IN THE

Supreme Court of the United States

OCTOBER TERM 1941

No. 214

FORT STREET UNION DEPOT COMPANY,
Petitioner

vs.

MARGARET M. HILLEN, as Special Administratrix of the Estate of Samuel Hillen, Deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

Your petitioner, Fort Street Union Depot Company, respectfully prays that a Writ of Certiorari issue to review a decision and judgment of the United States Circuit Court of Appeals for the Sixth Circuit reached by a divided court.

I. *Statutes Involved*

The question of the applicability of the following Federal Statutes is presented:

1. The Federal Employers' Liability Act of April 22, 1908, Chapter 149, 35 Statutes at Large 65, as amended by the Act of April 5, 1910, Title 45 U. S. C. A., Sec. 51, which

gives to an employee of a "common carrier by railroad" an action for damages against the employer for injuries resulting from negligence.

2. The Federal Safety Appliance Act of March 2, 1893, Chapter 196, Sec. 4, 27 Statutes at Large 531, as amended, Title 45 U. S. C. A., Sec. 4, which provides:

> "*Grab irons or handholds for security in coupling and uncoupling cars.* Until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

II. *Summary Statement of Matters Involved*

Respondent brought action in the District Court of the United States for the Eastern District of Michigan, Southern Division, on May 10, 1939, alleging an action under the Federal Employers' Liability Act and claiming a violation of the Federal Safety Appliance Act (R. 1). The declaration filed by respondent alleged that on February 2, 1939, while the deceased was riding upon a car, he was struck by a broken, defective and protruding grab-iron on a car which the declaration claims was being moved on an adjacent track (R. 4).

The case was tried before a jury April 23, 1940, and the jury, after the court had denied petitioner's motion to direct the verdict, found in favor of the respondent in the sum of $22,000 (R. 162). Motion for judgment non obstante veredicto was filed May 1, 1940 (R. 163), denied on May 17, 1940 (R. 165), and judgment on the verdict entered on that date (R. 166). Appeal was duly taken to the Circuit Court of Appeals for the Sixth Circuit where a divided

court, with Judge Xenophon Hicks dissenting, affirmed the judgment of the District Court on April 16, 1941 (R. 174). Petition for rehearing was filed with the said Circuit Court of Appeals on May 14, 1941 (R. 185), and was denied on May 15, 1941 (R. 199).

No testimony was offered at the trial by respondent that a car was being moved with a defective grab-iron as alleged in the declaration, and no testimony was offered at the trial by respondent that there was a defective grab-iron on any car prior to the accident. If respondent's claims are true, decedent, while he was unnecessarily riding the side of a car into a place of close clearance (R. 80, 120), struck against a grab-iron which was on a passenger car standing stored on an adjoining track. He was knocked to the ground with a broken hip, taken to the hospital, and there died a month later of pneumonia. Respondent claims that the deceased stated to one of the witnesses who gathered at the scene after the accident that he was riding on the side of a car, struck against a grab-iron, and got knocked off (R. 25). This was the only testimony offered by respondent to show the manner in which the decedent was injured and was received in evidence by the trial judge as part of the res gestae.

The positive and undisputed testimony offered by petitioner established that the grab-iron on the standing car was in proper position and condition up to the moment of the accident (R. 106, 109); that immediately after the accident it was found that the bolts holding the lower end had been newly sheared off (R. 87) and the lower end of the grab-iron pushed forward in the direction the deceased was riding and turned into the vestibule of the car (R. 81); that one of the bolts which held the grab-iron was found freshly broken upon the ground (R. 114); and that petitioner's yard master immediately after the accident straightened the grab-iron temporarily pending repairs (R. 81).

Sometime after the accident and after the grab-iron had been temporarily straightened by petitioner's yard master, a witness who was called by respondent observed the grab-iron and he testified that it then protruded from the car four or five inches and slightly to the east (R. 30-31). The Circuit Court of Appeals, with Judge Allen and Judge Martin concurring (R. 174) and with Judge Hicks dissenting (R. 181), held that the testimony of this witness was admissible as proof that the grab-iron was defective before the accident and that the jury had the right to disbelieve the undisputed testimony of the yard master and the undisputed testimony of petitioner's witnesses that the grab-iron was in good condition immediately prior to the accident.

Respondent offered at the trial by way of rebuttal, and which was received by the trial judge over the objection of petitioner's counsel, the testimony of a so-called expert who on the showing that he was a metallurgist was permitted to say that in his opinion decedent's body striking against the grab-iron would not shear the bolts which held it (R. 126). The witness had the bolt in his possession for only five minutes, he said, and made no test of its tensile strength or structure (R. 127), and the hypothetical question which formed the basis of his answer omitted important facts and included unproved facts, and, as pointed out by Judge Hicks in his dissenting opinion (R. 182), the answer of the witness was allowed to give rise to an inference that decedent's body did not shear the bolts, in the face of the obvious fact that decedent's body did shear the bolts.

In the course of his work, decedent, if he was where he should have been, had only to bring a string of cars to a stop by turning a valve on the end of an air hose. The train was moving four to five miles an hour, and he could have done this by walking along a cement platform, a place

of absolute safety, or he could have ridden in the vestibule of the car, likewise a place of safety (R. 79, 80). Instead, if respondent's claims are true, decedent, weighing approximately 260 pounds (R. 80), rode between two cars which afforded a clearance of only 16 inches (R. 120), thus unnecessarily taking an extremely dangerous way in which to perform his work when an absolutely safe way was open to him.

Petitioner is a depot company and not a terminal railroad and acts as a landlord of three railroad companies which enter its depot, and, by agreement with the three tenant railroad companies, makes up and breaks up trains and cleans and services their equipment (R. 32, 33). The Circuit Court of Appeals held that the depot company was a common carrier within the provisions of the Federal Employers' Liability Act and that decedent, although not engaged in the handling of the grab-iron on the standing passenger car, or with the car itself, was nevertheless within the provisions of Section 4 of the Safety Appliance Act and, since the jury held that the Safety Appliance Act had been violated, respondent was entitled to recover without proof of negligence.

III. *Questions Presented*

1. May Section 4 of the Safety Appliance Act, Title 45, U. S. C. A. Sec. 4, be extended so as to bring within its provisions employees who were not engaged in making any use of the appliance or of the car upon which it was contained and permit recovery for injuries without proof of negligence?

2. Is a depot company, which is not a terminal railroad company and which performs no services as a common carrier, nevertheless a common carrier within the meaning

of the Federal Employers' Liability Act, Title 45, U. S. C. A., Section 51?

3. Where the testimony of credible and unimpeached witnesses is undisputed, may the jury be permitted to disregard the testimony and by surmise and conjecture assume the existence of facts favorable to its decision?

4. May the Circuit Court of Appeals arbitrarily disregard undisputed, credible, and unimpeached testimony and assume the existence of facts which did not and could not exist to reach its decision?

5. May a Circuit Court of Appeals disregard a ground of appeal and decline to pass upon it when its decision is against the appellant?

6. Is testimony admissible as res gestae when the circumstances relied on to make it admissible are not proved but are themselves presumed?

7. Will an inference which it is claimed arises from the testimony of a witness presented as an expert, given in response to a question which omitted necessary and important facts, and which included unproved facts, negative an obvious and established fact?

8. Does a trial court err in submitting a question to a jury the decision of which must rest upon guess, speculation and conjecture?

9. Where an employee unnecessarily adopts an extremely dangerous method of performing his work when an absolutely safe method is open to him and he receives injuries through an accident which would not have occurred had he employed the safe method, is his own negligence the proximate cause of his injuries?

IV. *Jurisdiction*

The jurisdiction of this court is based on the Judicial Code, Sec. 240 as amended by the Act of February 13, 1925, 43 Statutes 938, Title 28 U. S. C. A., Sec. 347.

The date of the judgment of the Circuit Court of Appeals of the Sixth Circuit sought to be reviewed is April 16, 1941. Petition for rehearing was denied on May 15, 1941 (R. 199). This petition for a writ of certriorari is filed within three months from the date of the judgment of the Circuit Court of Appeals.

V. *Reasons Relied on for the Allowance of the Writ*

1. The Circuit Court of Appeals by its majority decision held that the jury had the right to disbelieve the undisputed, uncontradicted, credible and unimpeached testimony of petitioner's witnesses. This holding is in conflict with the applicable decisions of this court and in conflict with the accepted and established course of judicial procedure. The court should have held that the trial judge and jury were bound by testimony which is undisputed, uncontradicted, credible and unimpeached, and unless this court takes jurisdiction, the decision of the Circuit Court of Appeals sanctions future rulings of the trial judge that juries may disbelieve such testimony.

Pa. R. Co. v. Chamberlain, 288 U. S. 333, 340-341,

C. & O. v. Martin, 283 U. S. 209.

2. In the trial court, petitioner, by motion to direct and by request to charge, and by motion for judgment non obstante veredicto, requested judgment for petitioner on the ground that there was no question which could be submitted to the jury except that which called for guess, speculation and conjecture. The Circuit Court of Appeals

declined to consider this ground for reversal. Petitioner submits that it was entitled to have this ground for reversal considered by the Circuit Court of Appeals. The court not only refused to consider this question, but the judges joining in the majority opinion, themselves indulged in speculation, surmise, guess and conjecture in assuming facts which did not exist.

3. At the conclusion of the proofs, the record was in such plight that there was no question which could have been submitted to the jury except which called for guess, speculation and conjecture, and petitioner was for this reason entitled to a direction of the verdict.

The Circuit Court of Appeals erred in failing to reverse the case on the ground that testimony which rests on guess, speculation and conjecture will not be allowed to stand against uncontradicted and unimpeached positive testimony.

Southern Railway v. Walters, 284 U. S. 190;

Pennsylvania Ry. v. Chamberlain, 288 U. S. 333;

C. M. & St. P. Ry. v. Coogan, 271 U. S. 472;

Patton v. T. & P. Ry. Co., 179 U. S. 658, 663.

4. In its majority opinion, the Circuit Court of Appeals, in holding that a plaintiff, in order to recover for injuries alleged to have been sustained as a result of a violation of the Safety Appliance Act, need prove merely that at some indefinite time after the accident there was a defective appliance, relieved the plaintiff from the burden of proof and placed such onus upon the defendant, and has thereby so far departed from the usual course of judicial proceedings and by its decision sanctioned such departure in the future on the part of trial courts in the Sixth Circuit as to call for the exercise by this court of its power of supervision.

5. Locally the State trial courts have held the Fort Street Union Depot Company to be not a common carrier. The holding of the Circuit Court of Appeals that a depot company, although not a terminal railroad, which does not operate a railroad as a means of carrying for the public, does not transport either persons or property by railroad or engage in rail transportation as a common or public calling, is nevertheless a common carrier by railroad within the meaning of the Federal Employers' Liability Act, presents an important question of Federal law which has not been, but which should be, settled by this court.

6. The holding of the Circuit Court of Appeals that decedent was within the class of employees designed to be protected by Section 4 of the Safety Appliance Act, even though he was making no use of the grab-iron in any way whatsoever, presents a question of Federal law of the utmost importance, because if the holding is correct, its effect is to extend Section 4 of the Safety Appliance Act so as to bring within its provisions a new and different class of employees. This court has not decided the question.

7. The holding that the testimony offered by respondent as res gestate was admissible, although based on circumstances which were presumed, and without proof of time or spontaneity, is in conflict with the decisions of other Circuit Courts of Appeal

Aetna Life Ins. Co. v. Kern-Bauer, 62 Fed. (2d) 477 (C. C. A. 10th);

Aetna Life Ins. Co. v. Ryan, 255 Fed. 483 (C. C. A. 2nd);

Bonner v. Texas Co., 89 Fed. (2d) 291 (C. C. A. 5th);

and in conflict with the decision of the highest court in the State of Michigan,

Rogers v. Saginaw R. Co., 187 Mich. 490.

8. The power of supervision of this court should be exercised to review the refusal of the Circuit Court of Appeals to hold that the proximate cause of decedent's injuries was his own negligence in adopting the extremely dangerous method of stopping the train while riding on the side of a car and into a place of very narrow clearance when the convenient and safe method was open to him of placing himself in the vestibule of the car or walking along the cement platform with the air hose in his hand.

Davis v. Hand, 290 Fed. 73;

McCalmont v. Pa. Co., 273 Fed. 231.

WHEREFORE, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I. *The Opinions of the Court Below*

No opinions were filed in the trial court. The opinions of the Circuit Court of Appeals have not yet been published but will be found on pages 174 and 181 of the record which is furnished herewith in accordance with Supreme Court Rule 38.

II. *Jurisdiction*

The jurisdiction of this court is based upon the judicial code Section 240 as amended by the Act of February 13, 1925, 43 Statutes 938; U. S. C. A., Title 28, Section 347.

III. *Statement of the Case*

The essential facts of the case are fully stated in the accompanying petition for certiorari and in the interests of brevity are not repeated here. Any necessary elaboration of the evidence on the points involved will be made in the course of the argument which follows.

IV. *Specification of Errors and Argument Thereon*

1. The trial court erroneously held that even though the testimony of petitioner's witnesses was undisputed and unimpeached the jury nevertheless had the right to disbelieve such testimony, and the United States Circuit Court of Appeals erred in sustaining the trial judge.

The holding in the majority opinion of the Circuit Court of Appeals sanctions and approves the position taken by the trial judge so that in any case before him in the future he need not be bound by undisputed, credible and unimpeached testimony, but may submit the case to a jury with instructions that the jury may disbelieve such undisputed, credible and unimpeached testimony.

This is a complete departure from the Federal rule as laid down by this court in the cases of *Pennsylvania Railroad Co. v. Chamberlain*, 288 U. S. 333, 342, and *Chesapeake & Ohio Railway v. Martin*, 283 U. S. 209. In the *Martin* case this court (at p. 216) said:

> "We recognize the general rule, of course, as stated by both courts below, that the question of the credibility of witnesses is one for the jury alone; but this does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony, when from no reasonable point of view is it open to doubt."

It is respectfully submitted that to correct this erroneous concept of legal jurisprudence this court should exercise its powers of supervision.

2. The trial court erred in refusing to direct a verdict for petitioner on the ground that there was nothing to submit to the jury except that which called for guess, speculation, and conjecture, and the Circuit Court of Appeals erred in refusing to give consideration to this ground for reversal, and erred in refusing to reverse the case on this ground.

It was the claim of respondent's declaration, filed in the trial court, that decedent was injured when he was struck by a broken, defective and protruding grab-iron on a car which was being moved by petitioner. At the trial, no proof was offered by respondent to show that there was a defective grab-iron on any car any where prior to the accident. Respondent's proof considered in its strongest light showed merely that decedent struck against a grab-iron and was knocked to the ground. Petitioner's proofs, on the other hand, showed conclusively that the grab-iron which respondent claims the decedent struck against was in proper place and condition up to the moment of the accident (R. 106, 109), and that immediately after the accident the break was found to be a new one (R. 87, 114) with one of the bolts which held the grab-iron newly broken and on the ground (R. 114). In this situation, it is respectfully submitted that petitioner was entitled to have the Circuit Court of Appeals give consideration to its claim made in that court as the ground for reversal that the trial judge erred in refusing to hold there was nothing to submit to the jury except that which called for guess, speculation and conjecture.

In another case, *Parker v. Gulf Refining Co.*, 80 Fed. (2d) 795, 796, the Circuit Court of Appeals, Sixth Circuit, held:

> "To submit to a jury a choice of probabilities is but to permit them to conjecture or guess, and where the evidence presents no more than such choice, it is not substantial."

In the case at bar the Circuit Court of Appeals, in its majority holding, refused to apply the principle of this case and refused to apply the rulings of this court as laid down in *Pa. R. R. Co. v. Chamberlain,* 288 U. S. 333 and *C. M. & St. P. Ry. v. Coogan,* 271 U. S. 472.

It is respectfully submitted that the Circuit Court of Appeals erred in refusing to reverse the judgment of the trial court on this ground.

3. The trial court erred in holding that petitioner was subject to the Federal Employers' Liability Act and that decedent at the time he was injured was within the class of employees contemplated by the Safety Appliance Act, and the Circuit Court of Appeals erred in sustaining this holding of the trial court.

Petitioner is not subject to the Federal Employers' Liability Act unless it is a common carrier by railroad.

> "In our opinion the words 'common carrier by railroad,' as used in the Act (Federal Employers' Liability Act) mean one who operates a railroad as a means of carrying for the public—that is to say, a railroad company acting as a common carrier." *Wells Fargo v. Taylor,* 254 U. S., 175.

The proofs at the trial established that it was a mere landlord of three railroad companies which independently operated into its depot. Petitioner does not engage in the transportation of either property or passengers and does not hold itself out as ready or willing to do so. It does not engage in a common or public calling, but in a purely private endeavor. It is not a terminal railroad company. Whether a depot company which is not a common carrier

may be held to be subject to the provisions of the Federal Employers' Liability Act, which applies only to common carriers by railroad, is a question which has never been decided by this court. The Circuit Court of Appeals erroneously considered petitioner depot company as a terminal railroad company performing services for the public (R. 180). In this, that court erred. Petitioner, in maintaining its depot as a landlord and in servicing the equipment of its tenants, is doing that which conceivably and indirectly is a benefit to the public, but, in maintaining its depot, petitioner does not engage in the transportation of persons or property and does not perform any transportation services as a common or public calling and is not, therefore, a common carrier by railroad. Its liability for injuries to employes must be measured by the common law and by the compensation laws of the State.

The Circuit Court of Appeals sustained the holding of the trial court that decedent was within the class of persons designed to be benefited by the provisions of Section 4 of the Safety Appliance Act. This court held in *San Francisco R. R. Co. v. Conarty*, 238 U. S. 243, that to be within the class of employees contemplated by Section 2 of the Safety Appliance Act, providing for automatic couplers, the employee must be engaged in or about the train or car having the safety device. The Circuit Court of Appeals refused to consider this case as being applicable. It was the claim of petitioner in the trial court and in the Circuit Court of Appeals that because decedent was not making any use of the grab-iron, which respondent claimed was defective, or the car upon which it was contained, that he was not within the provisions of Section 4 of the Safety Appliance Act, and, therefore, to entitle respondent to recover, proof of negligence must be made. The trial court held that proof of negligence was not necessary, and the Circuit Court of Appeals sustained this holding.

If Section 4 of the Safety Appliance Act is to be extended so as to include decedent, then it must be held that all persons are included within its provisions, and we submit that this is the function of the Congress, and until Congress speaks the Circuit Court of Appeals should be bound by the principle as laid down by this court in the Conarty case.

4. The Circuit Court of Appeals, by its majority holding (R. 176), erred in holding that the testimony of respondents' witness Drake (R. 122) was properly admitted by the trial court and entitled to weight as evidence. Reference is respectfully made to a discussion of the testimony of the so-called expert in the dissenting opinion of Judge Hicks (R. 182).

5. The grounds that decedent's negligence was the sole proximate cause of his injuries and that the testimony offered by respodnent as res gestae was inadmissible have been already covered under the heading "Reasons Relied On for the Allowance of the Writ" in the petition for certiorari, and for the sake of brevity will not be continued here.

Respectfully submitted,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NO QUESTIONS PRESENTED TO REQUIRE WRIT

This is simply an action to recover damages for personal injuries resulting in death because of a violation of the Safety Appliance Act pertaining to hand-holds.

On pages 5 and 6 under the heading "Questions Presented," nine questions are set forth as a basis for the granting of the Petition for Writ of Certiorari.

These questions are *not in fact presented* by the Record. Were all of these questions undetermined and were they presented by the Record, there would be no question but that a writ should be granted. But most of the questions are not presented. Those that are have been determined by decisions of this Court.

The decision of the Circuit Court of Appeals of the Sixth Circuit is consistent with all decisions of the Supreme Court of the United States bearing on the question of liability for violations of the Safety Appliance Acts.

FACTS

Before going into each of the questions set forth on pages 5 and 6 of the Petition, a brief statement of the facts will be made.

Hillen was riding upon the side of a railway car, being moved upon one of two parallel tracks. He was riding in the place and in the manner employees ordinarily and customarily rode (17, 18, 19, 27, 28). While riding in such position he was struck by a grab-iron, which protruded from a car on the adjoining track (25, 26). He was knocked from the car to the ground (25).

After Hillen was struck it was discovered that the lower end of the grab-iron on the car on the adjoining track was not fastened to the car.

To quote from the opinion of the Circuit Court—

> "A part of one of the two bottom bolts of the grab-iron was found in the snow on the ground nearby and appeared to have been sheared off or broken;" (175)
>
> * * *
>
> "One of appellee's witnesses testified that after the accident he noticed that the grab-iron *was bent outward towards the other track a distance of four or five inches* 'and a little towards the east'" (176).

Within a few minutes after the accident Hillen stated that he (to again quote from the opinion of the Circuit Court) "had been riding the corner of the car and had been struck in the back or hip by the grab-iron and 'got knocked off'" (176).

Hillen died as a result of the accident.

There was evidence by the defendant that the grab-iron was in perfect condition before the accident, this evidence being given by a porter and the club car conductor (103, 109). This evidence did not have a very satisfactory ring and was rejected by the jury, as was their privilege. (See

opinion Circuit Court—179.)

Defendant contended, although it had no proof of it, that Hillen's body struck the grab-iron, broke the bolts and bent the grab-iron. The train was going four or five miles an hour. Plaintiff offered testimony of an expert, which will be hereafter referred to, showing the impossibility of a man's body moving at that rate of speed breaking the bolts in question.

QUESTIONS PRESENTED

To return now to the questions presented, question 1 on page 5 asks whether the Safety Appliance Act is to be extended to "employees who were not engaged in making any use of the appliance."

That a recovery may be had even though the employee be not at the time making use of the appliance has been decided by this Court in *Minneapolis & St. L. R. Co. vs. Gotschall*, 244 U. S. 66, 61 L. Ed. 995, 37 Sup. Ct. 598. The right to recover has even been extended to cover a pedestrian at a highway crossing. See *Fairport vs. Meredith*, 292 U. S. 589, 78 L. Ed. 1446, 54 Sup. Ct. 826.

The rule was stated in *Davis vs. Wolfe*, 263 U. S. 239, 68 L. Ed. 284, 44 Sup. Ct. 64, that an employee "can recover if the failure to comply with the requirements of the act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection."

As stated by the Circuit Court (181)—

> "It is not necessary that the employee be engaged in an operation in which the safety appliances are specifically designed to furnish him protection."

The question as to whether the depot company was a common carrier, as asked in question 2 on pages 5 and 6 of the

Petition, is answered by the Circuit Court on page 180 of the Record by the citation of *Union Stock Yard Co. vs. United States*, 308 U. S. 213, 220.

Furthermore, the point as to whether the defendant was a common carrier was not in the case in view of the following: (We quote from the charge of the Court to the jury—141)

> "First, let me say that I think it is undisputed and conceded that the defendant is a common carrier; secondly, that it was at the time of the happening of the accident engaged in interstate commerce, or else these lines would not apply. So, those two assumptions you may take into consideration, if not as conceded, as the law.
>
> Counsel, I assume, *concedes* that they are a common carrier. However, counsel may object later on if that is not so—from the expression on counsel's faces. I will say this, that if counsel do not accept what the Court says—*but you accept it.*"

Question 3 on page 6 is as follows:

> "Where the testimony of credible and unimpeached witnesses is undisputed, may the jury be permitted to disregard the testimony and by surmise and conjecture assume the existence of facts favorable to its decision?"

The credibility of the testimony of the porter and the sleeping car conductor was for the jury. (Opinion Circuit Court —179.)

There was no question of surmise or conjecture in the case. The grab-iron did protrude four to six inches. This was no conjecture. This appeared positively by credible testimony of the witness Carey (31). There was no surmise or conjecture about a bolt being broken and the grab-iron being unfastened. This was *admitted* by defendant. (Answer of Claim Agent Fitzpatrick—10-11.)

Other of defendant's witnesses admitted this. See testimony of defendant's witness Dominas (118)—

> "Q. And did you notice the grab-iron?
>
> A. The grab-iron was bent, and the bottom bolts was sheared off, was broken off, and the grab-iron was bent towards east" (120).

We quote question 4 on page 6 of the Petition:

> "May the Circuit Court of Appeals arbitrarily disregard undisputed, credible and unimpeached testimony and assume the existence of facts which did not and could not exist to reach its decision?"

The Circuit Court cannot arbitrarily disregard undisputed, credible testimony, but in the present case the question of the credibility of the witnesses was for the jury. The Circuit Court *did not assume* the existence of any facts. There was no question but that the grab-iron was loose, and that it did hit Hillen, who was riding where he had a right to ride, in a place in which employees ordinarily and customarily rode. (Witness Sullivan, 18, 19; Carey, 27, 28, 29.)

The answer to question 5 is that the Circuit Court of Appeals did not disregard any necessary grounds of appeal. A reading of the opinion sufficiently shows that question 5 presents nothing for this Court.

We quote question 6 from page 6 of the Petition:

> "Is testimony admissible as *res gestae* when the circumstances relied on to make it admissible are not proved but are themselves presumed?"

No circumstances to make the *res gestae* testimony admissible were presumed. The simple fact was shown that the deceased was riding where he had a right to ride; that within a few moments after the accident he said that something had hit him in the back and knocked him off. The grab-iron was found protruding and in such a position that it lessened

the clearance between the cars.

Question 7 deals with inferences claimed to arise from the testimony of an expert witness. This clearly does not present a question for review by the Supreme Court of the United States.

Professor Drake of Wayne University was called as a witness (122). He said that it would have been impossible for the body of Hillen to have broken the steel bolts fastening the grab-iron to the car. At the time of the accident the car upon which Hillen was riding was going between four and five miles an hour. (Testimony of Engineer Dose, 37.)

> "It is my opinion that a body of that weight traveling at that speed could not shear those two bolts," and again, "in this particular case there is enough steel here —there would be in two bolts—to be four or five times as much steel as would be necessary to take that load that was put on it by the impact of that body against it." (Professor Drake, 126.)

Question 8 is as fo'lows:

> "Does a trial court err in submitting a question to a jury the decision of which must rest upon guess, speculation and conjecture?"

We readily concede that a trial court would err in submitting questions to a jury based upon guess, speculation and conjecture, but *that is not what was done here.* The case was based upon the *positive testimony* that the grab iron *was loose* from the end of the car, that it *protruded four to six inches;* that *it struck Hillen* in the back, *knocked him off* the car, and as a result of being struck in the back, Hillen died—so the question asked was not in the case.

Question 9 is as follows:

> "Where an employee unnecessarily adopts an extremely dangerous method of performing his work when an absolutely safe method is open to him and he receives

injuries through an accident which would not have occurred had he employed the safe method, is his own negligence the proximate cause of his injuries?"

There is *no evidence* that Hillen unnecessarily adopted an extremely dangerous method of performing his work. Even had there been such a question presented, the issue would have been for the jury under the decision of this Court in *Socony-Vacuum Oil Co. vs. Smith*, 305 U. S. 422, 83 L. Ed. 265, 59 Sup. Ct. 262, but the question is not even in the case as a fact issue for the jury.

On page 8 of the Petition it is said that the Circuit Court of Appeals held "that a plaintiff, in order to recover for injuries alleged to have been sustained as a result of a violation of the Safety Appliance Act, need prove merely that at some indefinite time after the accident there was a defective appliance."

It is further said that the Circuit Court relieved plaintiff from the burden of proof. This statement is not correct.

The Court instructed the jury as follows:

"That it is the duty of the plaintiff to satisfy you by a preponderance of the evidence that there was this defective or ill-placed or dangerously placed grab-iron. That must be established by a preponderance of the evidence.

If you find that it was not a defective grab-iron that caused the accident, that that was not one of the moving or proximate causes, then, of course, your verdict will be for the defendant.

If you find that the evidence introduced by the defendant outweighs that of the plaintiff it would then be your duty to bring in a verdict for the defendant, because that would mean that the plaintiff has not established the negligence complained of by a preponderance of the evidence" (145).

The evidence amply justified this instruction and the Circuit Court upheld the trial court, but made no such holding as suggested by the question.

On page 9, reason 6 for granting the writ is that the employee was not "*within the class* of employees designed to be protected by Section 4 of the Safety Appliance Act."

This question is answered by the case of *Fairport vs. Meredith*, 292 U. S. 589, 78 L. Ed. 1446, 54 S. Ct. 826, and *Swinson vs. C., St. P., M. & O. Ry. Co.*, 294 U. S. 529, 79 L. Ed. 1041, 55 Sup. Ct. 517.

The reason for granting the writ assigned in point 7 on page 9 as to *res gestae* testimony does not present a question for consideration by this Court.

See *Director General vs. Clark*, 261 U. S. 621, 67 L. Ed. 831, 43 Sup. Ct. 432, where the petition for certiorari raised the same point.

This case presented purely fact questions. No useful purpose could be presented by a determination of the cause by this Court, which determination under the settled decisions of this Court could only be a reaffirmation of established rules.

Respectfully submitted,

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SEP 17 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1941

No. 214

FORT STREET UNION DEPOT COMPANY,
Petitioner

vs.

MARGARET M. HILLEN, as Special Administratrix of the Estate of Samuel Hillen, Deceased,
Respondent

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The unexpected and unfounded assertion of respondent's counsel on page 4 of their brief that the question whether defendant is a common carrier was not in the case because of the following quotation from the trial judge's charge, makes this reply necessary:

> "Counsel, I assume, concedes that they are a common carrier. However, counsel may object later on if that is not so—from the expression on counsel's faces. I will say this, that if counsel do not accept what the court says—but you accept it." (R. 141).

The point that defendant was not a common carrier was briefed and argued by both sides in the Circuit Court of

Appeals without any reference to this language of the trial judge.

It is significant that counsel make no claim for the language of the trial judge. They merely quote what the trial judge said and apparently trust that one reading the matter would draw the inference that there was a waiver of the point in the lower court. This is not the fact. The point was argued before the trial judge on defendant's motion for judgment non obstante veredicto (R. 164), and was briefed and argued by both sides in the Circuit Court of Appeals and there decided by the Circuit Court of Appeals adversely to defendant's contention.

When the trial judge discerned from the expression on counsel's faces that no such concession was made or intended, he turned to the jury and peremptorily instructed the jury to consider that the defendant was a common carrier, and when the court said "but you accept it," he was addressing the jury.

Whether depot companies which are not terminal railroad companies are common carriers has never been decided by this court. If the test of a common carrier, as stated in *Union Stock Yard Co. v. U. S.*, 308 U. S. 213, 220, the case relied on by counsel for respondent, is applied, then it must be said that defendant is not a common carrier railroad, and, therefore, not within the provisions of the Federal Employers' Liability Act.

The Safety Appliance Act

Plaintiff's decedent was not engaged in the handling of a car claimed to be defective. Plaintiff's claim is that he was injured by a defective grab-iron attached to another car which was standing still on another track. The question whether in this situation the so-called Safety Appli-

ance Act applies so as to relieve the plaintiff from the necessity of establishing negligence is new and has never been decided by this court. In *Davis v. Wolfe*, 263 U. S. 239, cited by respondent, the person injured was making use of the grab-iron claimed to have been defective. In the case of *Minneapolis R. Co. v. Gotschall*, 244 U. S. 66, cited by respondent, automatic couplers broke apart during the operation of a train and an employee on the train was thrown to the ground and injured. In the case of *Fairport v. Meredith*, 292 U. S. 589, cited by respondent, it was held that the provision of the act which required power brakes was for the benefit of travelers on the highway, because the obvious purpose of power brakes was to enable a train to stop quickly and efficiently. These cases in no way overrule the holding of this court in *St. Louis, etc. R. Co. v. Conarty*, 238 U. S. 243, where recovery was denied because he was not handling or riding on the car which it was claimed had a defective coupler.

Speculation and Conjecture

In their reply brief, counsel for respondent deny that the judges joining in the majority opinion of the Circuit Court of Appeals assumed the existence of facts in support of their opinion as claimed by petitioner in its petition for writ of certiorari.

1. The majority of the Circuit Court assumed that the porter "walked four times along the narrow strip of rough, wet ground between tracks numbers 6 and 7 * * *" (R. 178). There is absolutely no testimony whatsoever supporting this assumption. It was obvious that the porter descended from the car and crossed immediately to the supply room (R. 189).

2. The majority opinion of the Circuit Court of Appeals states that the jury may have considered it incredible that the porter used both hands in getting up into the car with his towels and supplies (R. 178). There is no support whatsoever in the record for the assumption that the porter held onto his bag of laundry instead of tossing it on the vestibule platform (R. 189).

Circuit Judge Hicks, in the dissenting opinion, concerning the testimony of the porter and conductor, said:

> "Their testimony was not discredited by any test of which I am aware. No statement of theirs was involved in any inconsistency or discrepancy upon any material matter." (R. 181-182).

3. It was undisputed that a piece of one of the bolts which held the grab-iron was found on the ground at the point of the accident newly sheared off. In disposing of this undisputed proof, the Circuit Court of Appeals conjectured:

> "While there seems to have been an agreement that a part of one of the bolts which had been newly broken or sheared off was found at the scene of the accident, in the light of the testimony of appellee's witnesses, the jury could have adopted the inference that the bolt had been broken some time before and that the part discovered merely failed to drop off out of its socket until the car was placed where the accident occurred, or thereafter." (R. 188, 179).

There is not a single word of testimony in the record which would support, even remotely, any such assumption, and its indulgence in the case at bar is contrary to the rule of the Circuit Court of Appeals for the Sixth Circuit itself. *Parker v. Gulf Refining Co.*, 80 Fed. (2d) 795. In this case the court, speaking through Judge Simons, held

"To submit to a jury a choice of probabilities is but to permit them to conjecture or guess, and where the evidence presents no more than such choice, it is not substantial."

The Grab-Iron in Question

Counsel for respondent, on pages 2 and 4 of their brief, state that after plaintiff's decedent was struck it was found that a grab-iron "on the car on the adjoining track was not fastened to the car." Expressed in this way, it conveys the suggestion that the car was in this condition before the accident. As stated by Judge Hicks in the dissenting opinion, the obvious fact is that the grab-iron broke when Hillen's body struck against it. Of course, the grab-iron was found broken after the accident and the undisputed proofs established that it was in good condition up to the moment of the accident.

Defendant's yardmaster testified (R. 81) that immediately after the accident occurred he found the grab-iron bent towards the east and twisted in on the inside of the vestibule steps, and that he straightened it as well as he could pending repairs. Plaintiff's witness testified that at some indefinite time after the accident had occurred, and after he had engaged in other work, he observed the grab-iron, and at that time found it protruding from the car four or five inches and bent slightly towards the east (R. 30-31).

These two stories were not in contradiction. They both stated the truth and both should have been believed in the trial court and the Circuit Court of Appeals should have so held as a matter of law. Obviously, defendant's witness placed the grab-iron in the condition in which plaintiff's witness testified that he found it (R. 186). The Circuit Court of Appeals, however, held:

> "The jury evidently disbelieved appellant's testimony that the grab-iron was twisted on the inside of the steps and believed appellee's story that the grab-iron was bent outward towards the other track a distance of 4 or 5 inches, and a little toward the east. It was the function of the jury to decide which of these stories it would accept." (R. 178).

If the majority opinion of the Circuit Court of Appeals is right in the case at bar, then it must be said that in every case where an appliance is found broken at some indefinite time after an accident, and the undisputed, credible, and unimpeached testimony established that it was in good condition at the moment of the accident, a trial judge may nevertheless permit the jury to disregard such testimony and find as a fact that the appliance was defective before the accident.

Plaintiff's counsel point to the fact that the trial judge in the case at bar charged the jury that plaintiff must establish a case by a preponderance of evidence, etc. They have misconceived the point presented. A defendant is entitled to a directed verdict when the plaintiff has failed to sustain the burden of proof, and in the determination of this question, the trial judge may not abdicate in favor of a jury.

It is respectfully submitted that the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit should be granted.

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